

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CINDY L. POE)	
Claimant)	
VS.)	
)	Docket No. 1,016,985
USD 229)	
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF SCHOOL BOARDS)	
Insurance Fund)	

ORDER

Claimant appealed the March 7, 2006, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

James R. Shetlar of Overland Park, Kansas, appeared for claimant. Timothy C. Gaarder of Kansas City, Kansas, appeared for respondent and its insurance fund, the Kansas Association of School Boards. Jennifer Arnett of Overland Park, Kansas, appeared for respondent as a self-insured employer.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant fell at work on December 9, 2003, and hurt her neck and back. Claimant believed her symptoms worsened when she continued to work for respondent and, therefore, she amended her accident date to include the days she worked after the December 2003 fall.

In the March 7, 2006, Award, Judge Hursh made three findings that are key to this appeal. First, the Judge found claimant failed to prove she sustained a permanent impairment to her thoracic spine. Second, the evidence failed to establish that claimant sustained a separate work injury after December 9, 2003. And third, the preexisting impairment claimant had in her neck and low back exceeded her present impairment. Consequently, the Judge denied claimant's request for permanent partial disability benefits on the basis that claimant sustained no additional permanent impairment due to her December 9, 2003, accident.

Claimant contends Judge Hursh erred. Claimant argues she should receive benefits for a 16 percent permanent partial general disability, which is computed by subtracting 12 percent for preexisting impairment from the 28 percent whole person functional impairment rating provided by her medical expert, Dr. Pedro A. Murati.

Conversely, the Kansas Association of School Boards argues the Board should affirm the Judge's finding that claimant failed to prove she sustained additional impairment due to her December 2003 accident and the work that she performed for respondent after that date. In addition, the Association argues June 27, 2005, is the appropriate date of accident for this claim, which makes respondent, as a self-insured, responsible for any benefits due claimant in this proceeding.

Respondent, as a self-insured, requests the Board to affirm the March 7, 2006, Award, which assessed claimant's medical expenses to the Kansas Association of School Boards.

This is a claim for permanent partial general disability benefits under K.S.A. 44-510e based upon claimant's functional impairment. The issues before the Board on this appeal are:

1. Did claimant sustain additional injury or additional functional impairment as a result of her December 9, 2003, accident or the work that she performed for respondent after that date?
2. What is the appropriate date of accident for these alleged injuries?
3. What is the nature and extent of claimant's functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant injured her neck, mid back, and low back at work on December 9, 2003, when she slipped and landed on her back. The parties stipulated claimant's accident arose out of and in the course of her employment with respondent. Claimant, who is a custodian, returned to work for respondent following the December 2003 accident. Consequently, claimant requests permanent partial general disability benefits under K.S.A. 44-510e based upon her functional impairment rating.

The medical care claimant received following her December 2003 fall included physical therapy; pain medications; an MRI of her cervical, thoracic and lumbar spine; three epidural injections in her sacroiliac joint; an epidural injection between the third and fourth lumbar vertebrae; an evaluation by a neurosurgeon to determine if surgery was appropriate; work conditioning therapy; and a functional capacity evaluation.

Unfortunately, that care did not completely resolve claimant's symptoms as at the time of the August 2005 regular hearing she continued to have constant pain in her low back, shooting pain into her legs, and mid back pain. In addition, her neck is stiff, it aches, she has headaches, and she has pain radiating down into her arms.

But this is not the first time that claimant had injured her neck and low back. In September 1990, while employed as a dump truck driver, claimant injured her neck and low back at work and she ultimately received a workers compensation settlement. At her settlement hearing, claimant described her September 1990 accident as follows:

Well, I was up on my truck knocking the dirt off because they overloaded me and I went to step down and grabbed the bar and I missed it and I hit my back on the step as I came down.¹

In her settlement, which was held on September 13, 1991, claimant received a lump sum payment of \$17,923.78 for a 12 percent whole person functional impairment for neck and low back injuries. The settlement documents entered into the record also indicated claimant was paid \$8,089.60 in temporary total disability benefits before the settlement hearing and that she waived her rights to (1) request additional medical benefits, (2) a hearing, (3) an attorney to represent her in the claim, (4) be examined by a doctor of her own choosing, and (5) job training.

According to claimant, she did not seek medical care for those injuries after the 1991 settlement. Moreover, she was not given medical restrictions due to the 1990 accident. Claimant testified that after receiving injections in her left buttocks, her symptoms completely resolved. Nevertheless, claimant also testified she experienced

¹ R.H. Trans., Resp. Ex. A.

some muscle-like pain in her back before the December 2003 accident, but that pain was not like her present symptoms.

Q. (Judge Hursh) . . . And now following this injury back when you had the settlement in 1991 what kind of symptoms persisted after that, after that injury when you were driving the dump truck?

A. (Claimant) None after I had the injections here in my left buttocks. I didn't have any more symptoms after that.

Q. Okay. So prior to -- let's say prior to December 9 of 2003 had you been having any kind of trouble in your back, be it the upper, lower, or middle?

A. A little bit, but it was just more muscle pain. It wasn't like this.²

In short, up until the December 9, 2003, fall, claimant was able to perform most of her job duties, except for lifting some of the heavier items.

In addition to the September 1990 and December 2003 accidents, claimant sustained several injuries working as a paraprofessional for another school district at Lakemary Center in Paola, Kansas, which is a school for special needs children. The record is not clear what medical treatment claimant received for the various injuries she sustained at Lakemary Center. Moreover, claimant fell and hurt her low back in December 2002 while working for respondent when she slipped and fell on the deck of a swimming pool. But she neither received nor sought any medical treatment for that fall.

Following her December 2003 accident, claimant missed approximately two weeks of work for which she received sick leave benefits. No claim has been made for temporary total disability benefits for that period. Her physician, Dr. Breeden, restricted her lifting to 25 pounds for about four months, which respondent accommodated. Accordingly, except for the heavier lifting, claimant returned to work for respondent performing her regular job duties. Claimant testified, however, that her neck, mid back, and low back symptoms have worsened since resuming her normal job duties.

Claimant continued to work for respondent through sometime in late June 2005, when she left work to have surgery for carpal tunnel syndrome, which is the subject of another workers compensation claim.

² R.H. Trans. at 26.

1. What impairment did claimant have in her neck and low back before the December 9, 2003 accident?

Dr. Steven Simon, who treated claimant's low back from January 24, 1991, through April 23, 1991, testified claimant complained of some pain and tingling in her legs and a sharp stabbing pain across her low back and buttocks following her September 1990 accident. The doctor diagnosed "a muscle imbalance primarily involving the pelvic floor with a sacroiliac dysfunction."³

My words were that she had a sacroil[i]itis and had a musculoskeletal ligamentous fascial which is a longer way to say that type of a problem affecting the pelvic region.

I also noted that the piriformis muscle was probably involved which is one of the internal rotators of the hip that is central because it lies next to the sciatic nerve, although I believe she did not allow me to do a rectal examination that would have verified that.⁴

The doctor also testified that a CT scan taken at that time showed a bulging disc between the fourth and fifth lumbar intervertebral levels. Moreover, other studies from that period raised a question whether claimant had a fracture across a vertebral lamina.

Dr. Simon prescribed anti-inflammatory and muscle relaxant medications, along with a therapy program to re-balance claimant's pelvic muscles. Later, claimant received anti-inflammatory injections in the sacroiliac joint and the gluteus medius muscle, which the doctor stated was one of the buttock's support muscles. At that point, Dr. Simon diagnosed sacroiliitis and questioned whether claimant had piriformis syndrome. Claimant's response to the injections further confirmed his suspicions that claimant had a hypermobile sacroiliac joint.

At their last visit in April 1991, Dr. Simon evaluated claimant for purposes of determining her functional impairment. Although he did not treat her neck, the doctor concluded claimant had a four percent whole person impairment due to loss of range of motion in her neck. Moreover, the doctor determined claimant had a 10 percent whole person impairment due to her low back and pelvic girdle problems. Those two ratings combined for a 12 percent whole person functional impairment.

³ Simon Depo. at 9.

⁴ *Id.* at 9-10.

The doctor's worksheets were not found and, therefore, he was unable to disclose the specific calculations and tables he used in 1991 to rate claimant. But Dr. Simon is certain that he used either the third edition of the *AMA Guides*⁵ or the revised third edition. The doctor further opined, however, that based upon his 1991 findings claimant would have a 10 percent whole person functional impairment rating for her low back and pelvic girdle problems under either the third edition of the *Guides*, the third edition revised, or the fourth edition as the rating should be based upon her loss of range of motion and structural deficits; and the ratings for those abnormalities are the same in those three editions of the *Guides*.

Likewise, Dr. Simon indicated that based upon his 1991 findings the fourth edition of the *Guides* would also have rated claimant's loss of range of motion in her neck as comprising a four percent whole person impairment.

No doctor was asked if claimant's impairment had changed during that period before her December 2003 fall or what her permanent impairment may have been immediately before her latest accident.

2. What impairment does claimant have now?

Claimant's attorney hired Dr. Pedro A. Murati, who practices physical medicine and rehabilitation, to examine claimant and testify in this claim. When the doctor examined claimant in January 2005, her chief complaints were neck pain with numbness and tingling in both arms, mid back pain, and low back pain with numbness and tingling in both legs. The doctor determined claimant had low back pain secondary to degenerative disc disease with signs and symptoms of radiculopathy, neck pain secondary to cervical myofascial pain syndrome, and mid back pain secondary to thoracic radiculopathy.

Dr. Murati rated claimant under the fourth edition of the *AMA Guides* and concluded she sustained a 10 percent whole person impairment for the low back pain secondary to radiculopathy, a five percent whole person impairment for myofascial pain syndrome affecting the cervical paraspinals, and a 15 percent whole person impairment for her mid back pain secondary to a thoracic sprain with radiculopathy. Combining those impairment ratings, the doctor determined claimant sustained a 28 percent whole person functional impairment. Interestingly, unlike Dr. Simon in 1991, Dr. Murati did not find any loss of range of motion in claimant's cervical spine.

Claimant did not tell Dr. Murati about her 1990 injury, the resulting functional impairment rating, or her workers compensation settlement. Dr. Murati, however, did

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

review Dr. Simon's April 23, 1991, report that rated claimant's functional impairment. Based upon Dr. Simon's 1991 findings, Dr. Murati would have rated claimant's low back problems with a five percent whole person functional impairment as Dr. Murati did not see anything in the report that indicated she had radiculopathy.

On the other hand, respondent's insurance fund, the Kansas Association of School Boards, hired Dr. Eden Wheeler, who also practices physical medicine and rehabilitation, to evaluate claimant for purposes of this claim. Dr. Wheeler examined claimant in July 2004 and diagnosed low back pain with multilevel degenerative disc disease, left sacroiliac joint dysfunction without clinical radiculopathy, and myofascial syndrome about the lower cervical paraspinals and thoracic musculature.

Using the fourth edition of the *AMA Guides*, Dr. Wheeler rated claimant as having a five percent whole person functional impairment due to her low back. The doctor did not find radiculopathy into claimant's legs as she was unable to reproduce her leg pain with the seated straight leg raising test or find any neurologic deficit that would correspond with radiculopathy. In addition, the doctor found claimant's reflexes intact, her sensation intact, and her strength symmetrical.

Dr. Wheeler initially concluded four of the five percent was related to claimant's December 2003 injury with the remaining one percent due to preexisting degenerative disease. But the doctor, however, changed her opinion after reviewing Dr. Simon's deposition testimony. Consequently, Dr. Wheeler's final opinion was that all of the impairment in claimant's low back preexisted the December 2003 accident.

Using the *Guides*, Dr. Wheeler rated claimant's upper myofascial pain syndrome about her cervical and thoracic spine at zero percent as she demonstrated minimal objective findings.

Considering the entire record, including claimant's testimony that her symptoms eventually resolved following her September 1990 accident, the Board is persuaded that claimant's whole person functional impairment increased from five percent to 10 percent as a result of her December 9, 2003, accident. Before December 9, 2003, claimant's symptoms were minimal, at most. But now her symptoms are affecting her ability to work. Moreover, she now has shooting pain into her legs. Like Judge Hursh, however, the Board is not persuaded claimant sustained any additional permanent injury or impairment to her cervical or thoracic spine.

Accordingly, the Award should be modified to grant claimant disability benefits for a five percent permanent partial general disability under K.S.A. 44-510e.

3. Did claimant sustain additional permanent injury or impairment after December 9, 2003?

Judge Hursh concluded December 9, 2003, was the appropriate date of accident for this claim. The Board agrees. Claimant's low back injury did not occur as the result of repetitive lifting or bending, or repetitive mini-traumas. Accordingly, the date of accident is not governed by those cases which pertain to repetitive use injuries or repetitive mini-traumas. Instead, claimant was injured in a single traumatic event and she is entitled to receive workers compensation benefits for that accident.

The Board also agrees with the Judge's finding that the evidence fails to establish that the work claimant performed after the December 9, 2003, accident caused either additional permanent injury or permanent impairment. Moreover, when claimant saw Dr. Wheeler in July 2004, she did not relate her symptoms to the work she performed after December 2003.

In conclusion, the Kansas Association of School Boards is responsible for the benefits due claimant in this proceeding.

AWARD

WHEREFORE, the Board modifies the March 7, 2006, Award as follows:

Cindy L. Poe is granted compensation from USD 229 and the Kansas Association of School Boards for a December 9, 2003, accident and resulting disability. Based upon an average weekly wage of \$463.49, Ms. Poe is entitled to receive 20.75 weeks of permanent partial general disability benefits at \$309.01 per week, or \$6,411.96, for a five percent permanent partial general disability, making a total award of \$6,411.96, which is all due and owing less any amounts previously paid.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Future medical benefits may be considered upon proper application to the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Timothy C. Gaarder, Attorney for Respondent and its Insurance Fund
Jennifer Arnett, Attorney for Respondent as a Self-Insured
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director